THE PRESUMPTION OF MALICE IN THE LAW OF MURDER.*

Lord Byron once observed:

> "Nothing so difficult as a beginning
> In poetry, unless perhaps the end."

I have found that to be likewise true of prose; and in this instance the difficulty is enhanced by the circumstance that I was requested to choose my subject for discussion before this Association—an assemblage composed of experts in every branch of jurisprudence.

While wondering what subject I should select, I chanced to become engaged in conversation with a friend, who is an accomplished lawyer. He told me he had been troubled much of late by trivial questions raised in criminal cases. "Actually," he said, "one lawyer recently contended that the trial court had erred in instructing the jury, in a case of homicide, that malice is presumed from the fact of killing; that every homicide in Virginia is presumed in law to be murder of the second degree; and that the burden is upon the defendant to prove extenuation, excuse, or justification."

I asked my friend the name of the lawyer who had made that contention. He said he did not remember. I told him the contention, in my opinion, was a sound one and eventually would be sustained by our courts. He regarded me with an expression of disappointment—one of those "et tu, Brute!" looks—knowing, as he did, that I had served as prosecuting attorney in my county for many terms. He asked me if I was familiar with the long line of Virginia decisions which sustained the instructions complained of. I told him I was; but that I believed the common-law doctrine underlying the instructions was erroneous and would be abandoned the first time it was seriously questioned in the Court of Appeals. His deportment indicated that my expression of a doubt respecting the soundness of the ancient doctrine made him feel that no principle of law could be regarded as firmly settled—that, indeed, "there's nothing serious in mortality."

*Address delivered by Edward P. Buford, of Lawrenceville, Va., before the Virginia State Bar Association at Lynchburg, Va., June 7, 1922.

That in former times the doctrine to which I have alluded was regarded as a fundamental principle of the law of homicide in this State is not to be questioned. I shall refer to but few of the many cases that might be cited in which the doctrine has been applied and approved.

In *Hill's Case,* 2 Gratt. 595, the court said:

"We also concur with the prisoner's counsel in their position, that under our statute, every homicide is *prima facie,* murder of the second degree; and in order to elevate the offence to murder in the first degree, the burden is cast upon the commonwealth. * * * On the other hand, in order to reduce the offence from murder in the second degree to manslaughter, the burden is cast upon the accused."

In *M'Whirt's Case,* 3 Gratt. 594, it was said:

"All homicide is, in the presumption of law, malicious; and of course amounts to murder, unless justified, excused or alleviated; and it is incumbent upon the prisoner to make out, to the satisfaction of the Court and jury, the circumstances of justification, excuse and alleviation."

In *Bristow's Case,* 15 Gratt. 634, the accused requested the following instructions:

(a) "If the jury shall have any rational doubt as to any important fact necessary to convict the accused of any offense whatever, they are bound to give the accused the benefit of that doubt."

(b) "If upon the whole evidence in the case, there is any rational hypothesis consistent with the conclusion that the homicide was excusable or justifiable, the accused cannot be convicted."

(c) "Every homicide is presumed in law to be murder of the second degree. It is, however, the duty of the jury to consider the whole testimony * * * and ascertain whether the prisoner has been guilty of murder of the first degree, murder of the second degree, or manslaughter, * * * or whether the homicide was not excusable."

Those instructions were refused, and the court, on the motion of the attorney for the Commonwealth, gave this instruction:

"Every homicide is presumed by law to be murder of the second degree. If the Commonwealth would elevate the offense to murder in the first degree, she must prove the characteristics of that offense, and if the prisoner would reduce the offense, the burden of proof is on him."

Instructions embodying this doctrine have been given in well-nigh every trial for murder in this Commonwealth and are given by the courts at the present day. Its most recent announcement is in *Jacobs* v. *Commonwealth,* 25 Va. App. 337, decided on March 16, 1922.

While I realize that most of us are not engaged in active criminal practice, I feel that the great object of the Association is to aid in the development of a scientific system of jurisprudence; and I believe you will be interested in an effort to eradicate an obsolete and erroneous legal formula, which, in its practical operation, may result in injustice to individual members of society.

I shall endeavor to show that the doctrine is erroneous in principle; that it is opposed by the opinions of eminent authors and the courts of other states; and that, while it has not in terms been overruled, it has practically been overruled in Virginia if effect be given to correct principles announced in two comparatively recent decisions of the Court of Appeals.

The principle I wish to submit for the consideration of the Association was tersely expressed by the Supreme Court of New Hampshire in *State* v. *Greenleaf,* 54 Atl. 38:

> "Malice is not an inference of law from the act of killing, but, like any other fact in issue, it must be found by the jury upon competent evidence."

It is impossible for us to know how many innocent persons may have suffered, while death was the punishment for all forms of common-law murder, or how many may have suffered, or may yet suffer, confinement in the penitentiary for murder of the second degree as a result of the doctrine I am endeavoring to combat. Error which may so seriously involve the life or liberty of the individual should not be permitted to remain a part of a system of enlightened jurisprudence.

The law of homicide occupies a unique position. It originated in remote antiquity. It is chiefly of common-law origin and development, influenced, to some extent, by ancient English legislation and the statutes of the State on the subject. In no branch of the law have the courts received less aid from legislation. The original common-law doctrines are traceable to edicts of Danish and Norman despotism. In view of its importance the legislation affecting it is strikingly inadequate. Even at the pres-

ent day, this branch of the law, especially so far as it concerns the crime of murder, is, for the most part, the outgrowth of judicial interpretations of terms employed in English legislation of many centuries ago. Those crude statutory terms and the terms employed in the ancient common law were inadequate to describe the varying phases of criminality involved in the unlawful taking of human life. The spirit of despotism and of superstition prevalent at that period prevented the application of humane principles even when the act of killing was admittedly excusable. The courts, in their effort to adapt the law to exigencies as they arose, found it necessary to resort to artificial interpretations, and out of those interpretations have grown the modern doctrines of homicide. Developed under such conditions, judicial opinions respecting even its most important doctrines abound in conflict and confusion.

We cannot understand the law of the present day without adverting to the political and ecclesiastical conditions in which it originated and under which it was developed in the slow process of common-law evolution.

The word "murder," in its origin, did not mean what it means today. It was imported by the Danish conquerors of Britian and, for the protection of their countrymen, was applied to the offense of secret killing. The despotic policy inaugurated by the Danes reached full development under the Normans.

The battle of Hastings and the events which followed it not only placed a Duke of Normandy on the English throne, but also gave up the whole population of England to the tyranny of the Norman race. The subjugation of a nation by a nation has seldom, even in Asia, been more complete. The country was portioned among the captains of the invaders. Strong military institutions, closely connected with the institution of property, enabled the foreign conquerors to oppress the native people. A cruel penal code, cruelly enforced, guarded the privileges, and even the sports, of the alien tyrants. Yet the subject race, though beaten down and trodden under foot, continued its resistance. Some bold men, the favorite heroes of our ancient ballads, betook themselves to the woods and there, in defiance of curfew laws and forest laws, waged a predatory war against their oppressors. Those were the days of Robin Hood and his followers. Assassination was an event of daily occurrence. Many

Normans suddenly disappeared leaving no trace. The corpses of many were found bearing marks of violence. Death by torture was denounced against the murderers, and strict search was made for them, but generally in vain, for the whole nation was in conspiracy to screen them. It was at length thought necessary to adopt the Danish practice and lay a heavy fine on every Hundred in which a person of Norman extraction should be slain; and this regulation was followed by another providing that every person found slain should be presumed to be a Norman, unless he was proved to be a Saxon.

To state these historical facts with more technical accuracy, I should say the name of *murder* as a crime was at first applied only to the secret killing of another; which the word "meorda" signified in the Teutonic language; and it was defined to be *"homicidium quod nullo vidente, nullo sciente clam perpetratur,"* for which the Hundred was liable to an amercement called "murdrum." This was in accordance with a Gothic usage, by which the Hundred, if it did not produce the murderer, was supposed to have committed, or at least to have connived at, the murder. It was introduced into England by Canute, to prevent the Danes from being privily murdered by the English, and was continued by William the Conqueror for the like security of the Normans. If the murderer did not take sanctuary for the felony, or was not apprehended, or ascertained so as to be outlawed or otherwise attainted, the Hundred could escape liability for the fine only by making presentment of Englishry, that is, by proving that the deceased was an Englishman.

Meanwhile the church of Rome had acquired complete ecclesiastical supremacy, and the clerical privilege, or benefit of clergy, became established as a bar to the enforcement of punishments by secular courts. Lord Coke observes, "the privilege of clergy took its roots from a constitution of the pope, that no man should accuse the priests of holy church before a secular judge." The English clergy demanded to be exempt from the jurisdiction of the lay tribunals; and, to an extent not quite certain, the demand was yielded to by the ancient common law and by acts of Parliament as early as Edward I or earlier. When a priest in orders was brought before a temporal judge on a charge of felony, his case was transferred, either with or without trial, to the ecclesiastics.

As scholarship was, for the most part, confined to the priesthood, it was assumed that men possessing the capacity to read were clergymen, and if the malefactor successfully read the verse set before him by the jailor—usually the first verse of fifty-first Psalms—the jailor pronounced the words "legit ut clericus"—he reads like a scholar. He was thereupon burned slightly in the hand and set at liberty. The verse entitling him to this privilege was known as the "neck-verse."

In Massinger's dramatic poem, "The Great Duke of Florence," this colloquy occurs between Calaminta and Fiorinda:

> Calam: "How the fool stares,"
> Fior: "And looks as if he were conning his neck-verse."

In Scott's "Lays of the Last Minstrel" Sir William of Deloraine makes this reply to the Ladye's command:

> "And safer by none may thy errand be done,
> Than, noble dame, by me;
> Letter nor line know I never a one,
> Were't my neck-verse at Hairibee."

At a later period, the canonical impediments were declared to be no longer barriers, women were admitted into the happy circle, the disqualification of ignorance was abolished, and the plea became universally available except in trials for offenses not clergyable.

In 1340 Edward III, preparatory to undertaking the invasion of France and desiring to gain popularity with his Saxon subjects, procured the enactment of a statute abolishing the fine which had been imposed upon the Hundred and dispensing with the "presentment of Englishry." Upon the enactment of that statute there ceased to be in the law any offense to which the term "murder" could be definitely applied. But by degrees the name came to be applied to the killing of an Englishman or foreigner through "malice prepensed," whether committed openly or secretly; and by statute enacted in 1389, "murder, or killing by await, assault, or malice prepensed" was not to be pardoned without special words.

In 1532 a statute was enacted, the effect of which upon the law of homicide was of great importance. By this statute it was provided "that no person or persons which shall hereafter happen

to be found guilty * * * for any wilful murder of malice prepensed * * * shall from henceforth be admitted to the benefit of his or their clergy, but utterly be excluded thereof, and shall suffer death." (23 Henry VIII, c. 1, Sec. 3.)

It was this statute that gave rise to the present distribution between the grades of felonious homicide known as *murder* and *manslaughter*. Every wilful killing attributable to what in this statute is called "malice prepensed" or "aforethought" or rather, which was attributable to what those terms, by judicial interpretation, were made to mean, was called murder, and all other kinds of felonious homicide came by degrees to be classified under the general name of manslaughter. In determining what homicides are felonious, we look to the common law substantially unaffected by statutory provisions in either England or Virginia. When we inquire what is murder as distinguished from manslaughter, we find the distinction originated in this statute.

This ancient history and these ancient enactments constitute, in general outline, the material from which the courts, unaided by further legislation, have been called upon to develop the law of homicide. I say "unaided by further legislation" because the legislation of the State contains no definitions. It merely classifies the several grades of unlawful homicide for the purpose of prescribing varying degrees of punishment.

The modern law of homicide originated in the statute 23 Henry VIII, chapter 1, section 3. At that time civilization was in its swaddling clothes. The legal atmosphere was permeated with despotic and artificial presumptions. When the law commenced to assume its present form and for many years afterwards, the accused was not allowed the assistance of counsel on questions of fact. The question of his guilt or innocence was disposed of by court and jury. He had no right of appeal. Bishop thus describes the conditions in which this particular presumption originated:

> "To ascertain * * * whether a felonious killing is murder or manslaughter we have simply to inquire whether it was committed of "malice aforethought" or not. But this inquiry is not a simple one. In former times, when in felony prisoners were compelled to appear without counsel, and the judge was in a measure counsel for them, and when the distinction between the functions of judge and jury was not

> well defined, and judges undertook to assist jurors as to the facts more than they do now, many things were laid down from the bench and transferred to our law books, of which no one can say whether they were meant to be opinions on the law or on particular facts in evidence. And particularly in homicide, it was customary for the jury to find the special facts, and submit them to the court to determine whether the grade of crime was murder or manslaughter. But the form of the finding was largely such as compelled the judges to draw inferences of fact from facts found; these inferences have been transmitted to us in the books as though they were inferences of law; they have been subsequently followed; and so a system of things has grown up, contrary to true principle and true law. Is it, then, a question of law, whether, under the particular circumstances of a case, the killing is to be deemed of "malice aforethought?" Now, according to what we read in the books generally, this question is a mixed one, wherein the law and fact are so blended as to leave the partition line at places uncertain, and at others variable and jagged. It is plain * * * that the difficulties attending our present inquiry relate to the presumptions, whether of law or fact, to be drawn from acts, as constituting or not the "malice aforethought" which distinguishes murder from manslaughter. But this doctrine of presumptions is unsettled and uncertain in all the departments of our law, while it is specially so in the law of our present sub-title. What was reasonably clear once is dim now; for time, in this matter, has brought mists, not sunshine."

In England there were no degrees of murder as under our statute. Every killing to which the courts imputed malice was punished with death. The only redress afforded the accused against an erroneous judgment was a petition for pardon. The judgment was not subject to appellate review as with us. Expressions of English trial judges, participating with juries in the determination of questions and inferences of fact, are now relied upon as authority for the anomalous doctrine, that "the law presumes malice from the fact of killing"—an expression which means nothing more nor less than that the law presumes every homicide to be common-law murder and imposes on the accused the burden of proving extenuation, excuse or justification.

Such a doctrine could not have originated in an enlightened age. It rests upon *dicta* of ancient English trial judges, not upon positive adjudications. Yet I have heard lawyers, impressed by

the reluctance of courts to depart from what is regarded as the highway of precedent, predict that the doctrine will continue to be applied by the courts of Virginia even in the twentieth century, notwithstanding that if effect should be given to the enlightened views expressed in *Litton* v. *Commonwealth,* 101 Va. 833, and in *Potts* v. *Commonwealth,* 113 Va. 732, the result would be that the doctrine has already been overruled.

I am not aware of any case which has come before the Court of Appeals in which the correctness of the presumption has been discussed. The Court seems to have adopted the doctrine from English precedents without having had occasion to give it discriminating consideration. The leading and most interesting American case which has come to my attention is that of *Commonwealth* v. *York,* 9 Metc. 93, decided by the Supreme Court of Massachusetts in 1845. Bennett and Heard give it a conspicuous place in their collection of Leading Criminal Cases.

York was indicted for murder. The evidence satisfied the jury that he committed the act of killing, but was too meager to show whether the killing was done in self-defense, so as to be excusable, or in mutual combat, so as to be manslaughter. After the case was committed to the jury with instructions from the court and they had been in consultation several hours, they sent to the court this question: "Were the jury instructed by the court, that the prisoner must prove provocation or mutual combat, and was not to have the benefit of any doubts on the subject?" To this question the court gave the following answer: "It is hardly possible to give a direct answer, affirmative or negative, to the question of the jury, without some explanation. The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious, and an act of murder. It follows therefore, that in such cases the proof of matter of excuse or extenuation lies on the accused; and this may appear either from evidence adduced by the prosecution or evidence offered by the defendant. But where there is any evidence tending to show excuse or extenuation it is for the jury to draw the proper inferences of fact from the whole evidence and decide the fact on which the excuse or extenuation depends, according to the preponderance of evidence. Where there is evidence on both sides, it is hardly possible to imagine a case in which there will not be a preponderance

of proof on one side or the other. But if the case, on the evidence, should be *in equilibrio* the presumption of innocence will turn the scale in favor of the accused; that is, in a case like the present, in favor of the lesser offense. But if the evidence, in the opinion of the jury, does not leave the case equally balanced, then it is to be decided according to its preponderance." The jury found the defendant guilty of murder, and his counsel moved for a new trial on the ground that the jury were misdirected.

In making the following comments on the case I shall follow closely the arguments of the brilliant lawyer, Mr. Dana, who appeared for the prisoner. I do so not only on account of its intrinsic merit, but also because his argument and the dissenting opinion of Judge Wilde—a legal classic—have already been consciously or unconsciously adopted by many of the courts, including the Court of Appeals of Virginia; and because I believe that sooner or later they will be accepted generally by the courts.

It is to be observed that by the instructions given to the jury their verdict was made to depend not upon their convictions but upon an arbitrary presumption of law and an artificial burden of proof, which are without analogy in other departments of the criminal law. A killing may be criminal or not criminal; and if criminal, it may be murder or manslaughter. From the mere act of killing there is no presumption in nature or from experience that it is criminal rather than not criminal, or, if criminal, that it is murder rather than manslaughter. Of the homicides that are committed few are found to be murders. A presumption of murder from the mere fact of killing is, therefore, contrary to reason and experience, as well as against liberty and life. The jury were satisfied that the prisoner killed the deceased. They were not satisfied that he killed him from malice. In this state of mind, they asked the court for the rule of law. If the court had ruled that the malicious killing charged was a single proposition, of the truth of which the jury must be satisfied beyond a reasonable doubt, the verdict would have been for manslaughter. But the court separated the proposition into two parts—the killing and the malice—and instructed the jury in effect that malice need not be proved, but was to be inferred by a technical presumption from the killing, and that the burden of proof was shifted upon the prisoner to disprove it. The jury were not al-

lowed to be judges even of the facts. A fact was given to them with an artificial weight attached to it by law, which they were not at liberty to disregard. They were required to draw an inference from it, which, as reasoning and observing men, they would not otherwise have drawn. They did not draw the inference of malice; the law drew it. The prisoner did not have the unbiassed moral conviction of the jury that he was guilty of murder. In Massachusetts there were no degrees. All murder was punished by death. The accused was sentenced to death—whether properly or improperly, no one can say. I am not sure that he was executed. I think I have read or been told that he was pardoned or the sentence was commuted.

The opinion of the majority of the court was delivered by Chief Justice Shaw. It shows great learning and research. It was met by the dissenting opinion of Judge Wilde. The divergent views expressed in the majority and dissenting opinions in *Commonwealth* v. *York* have given rise to two distinct lines of judicial authority.

The doctrine of the majority is:

"When, on the trial of an indictment or murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is, that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant, which may appear either from the evidence adduced by the prosecution, or from evidence offered by the defendant.

But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence and decide the fact on which the excuse or extenuation depends, according to the preponderance of evidence."

The doctrine of the dissenting opinion of Judge Wilde is:

"1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act of killing.

2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner.

3. That the burden of proof, in every criminal case, is on

> the Commonwealth, to prove all the material allegations in the indictment; and if on the whole evidence the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him."

Bennett and Heard in their notes thus refer to the case and to the two different opinions expressed:

> "No reported case can be found in England or America in which the law of implied malice is so thoroughly discussed, as in *York's* Case; and whether the doctrine of the majority or the minority of the court finally prevails, the case itself well deserves the name of a leading case in this branch of the law. The opinion of the majority of the court in *York's* Case is met with so great force of reasoning in the dissenting opinion of Judge Wilde, that if the former is erroneous, it carries with it its own antidote."

The doctrine announced in the majority opinion in *Commonwealth* v. *York* was the doctrine in Virginia until *Litton's Case.* It was the doctrine in Virginia established by *Hill's Case,* 2 Gratt. 595, and the "long line of Virginia decisions" referred to in *Potts* v. *Commonwealth.* The former doctrine in Virginia was derived from the same sources as that of the majority in *Commonwealth* v. *York.* Indeed, *Commonwealth* v. *York* was cited as authority in *Boswell* v. *Commonwealth,* 20 Gratt. 876. I say the "former doctrine in Virginia," because it is impossible to reconcile what was said in *Potts' Case* with what had been said in *Hill's Case* and the "long line of Virginia decisions."

Ineffectual efforts were made in England in 1873 to codify the law, to some extent at least, with the hope that it might be freed from many of its ancient excrescences. The effort was abandoned, however, and the task of developing a more humane system was left to the courts.

In 1875 Mr. Wharton published the second edition of his work on Homicide. His preface to that edition shows the fundamental changes which had taken place in judicial thought in the interval of twenty years after the publication of the first edition. He says:

> "For some years after the exhaustion of the first edition of this work, I declined to revise it for republication. The topic, so far as concerns its general principles, was discussed in my Treatise on Criminal Law; and in the successive editions of that work the intermediate changes of the law in

this respect are noted. The period, however, has now arrived when, in view of the fact that the first edition of the Homicide is still frequently cited in the courts, its revision and correction are imperative. The importance of the interest at stake demands that the applicatory cases should be stated at large and critically scanned; the changes which the last few years have wrought in the juridical conception of the Law of Homicide are so fundamental that it is proper not only that they should be correctly recapitulated, but that they should be fully discussed. * * * In the first edition of the present work the law in these relations was given as it then stood. Since then a more intelligent psychology and a more humane conception of jurisprudence have not only vindicated the modifications I have just specified, but these modifications, with greater or less completeness, have been adopted by the courts. I feel, therefore, that the time has now come when these modifications, with the reasons and authorities which sustain them, should be wrought into the text of a systematic treatise. I am not content to accept them in brief, with the small proportionate space that can be allotted to them, in the current editions of my Criminal Law. I am still less content that the first edition of my Homicide should continue to be cited as sustaining doctrines now obsolete."

Of the changes referred to by Wharton, the following are mentioned as among the chief:

"(a) That which treats malice and intent as inferences of fact, and not as presumptions of law."

"(b) That which holds that the defendant is to have the benefit of reasonable doubt, not merely as to the fact of guilt, but as to all the conditions essential to a conviction."

The first rift in the cloud in Virginia was disclosed in *Litton's Case,* not in anything said by the Court of Appeals in that case, but in what was afterwards said in *Potts* v. *Commonwealth,* 113 Va. 732. The trial court in *Litton's Case* added to an instruction, drawn in accordance with the familiar formula, these words, the substance of which the court had held was properly refused in *Bristow's Case*:

"Yet when the evidence is all in, then, if the evidence, both for the Commonwealth and the accused, leave a reasonable doubt as to the guilt of the accused, the jury must find the prisoner not guilty."

In *Potts' Case,* the trial court, on the motion of the Commonwealth, instructed the jury as follows:

> "1. The Court instructs the jury that if they believe from the evidence that the Commonwealth has proven, beyond a reasonable doubt, that the deceased was killed by the accused with a deadly weapon in his previous possession, and that the accused relies upon the defense of self-defense to excuse the act, then the jury are instructed that their minds must be satisfied from the evidence that the said defense is a true one.
>
> 2. The court instructs the jury that if they believe from the evidence that the killing was done with a deadly weapon, then the law presumes it was done with malice, and it is for the defense to satisfy the minds of the jury that it was not done with malice."

Both instructions announced, in slightly different language, the same proposition of law. Both were based upon the old rule which had always been recognized in Virginia—the same rule which was approved by the majority opinion in *Commonwealth* v. *York.* The Court of Appeals sustained the second instruction, for the following reason:

> "The last instruction, with some change of language, is the equivalent of instructions approved in *Hill's Case,* 2 Gratt. 595; *Bristow's Case,* 15 Gratt. 634; *Honesty's Case,* 81 Va. 284, and a long line of Virginia decisions."

The court reversed the judgment in *Potts* v. *Commonwealth,* on the ground that the first instruction was erroneous, and in doing so, with apparent unconsciousness, adopted the views expressed in Mr. Dana's argument and the dissenting opinion of Judge Wilde in *Commonwealth* v. *York,* which seem to have found a lodgment in the law of Missouri, from which our court quoted in giving the reasons for holding the first instruction erroneous. The reasons assigned by the court are in conflict with every decision previously rendered, and are as follows:

> "But we are of opinion that the circuit court erred in giving the first instruction. It is a fundamental principle of criminal law that a person charged with the commission of crime is presumed to be innocent; and that presumption follows the accused through every stage of the prosecution. Moreover, the plea of not guilty denies every essential allegation in the indictment, and lays upon the prosecution the burden of proving the guilt of the defendant beyond a reasonable

doubt. That burden is continuous, and can never be imposed upon the accused, although the evidence may shift from one side to the other, to meet the varying exigencies of the trial.

The rule is stated, with exceptional clearness and force, in *State* v. *Wingo,* 66 Mo. 181, 27 Am. Rep. 329, where it is said: 'That it devolves upon the state to establish by evidence the guilt of the accused beyond a reasonable doubt will not be controverted. The defendant, by his plea of not guilty, puts in issue every material allegation in the indictment. He is not required to plead specially any matter of justification or excuse. The case is not divided into two parts—one of guilt, asserted by the State, the other of innocence, asserted by the accused. He does not plead affirmatively that he is innocent, but negatively that he is not guilty; and on that issue, and that alone, the jury are to try the case throughout. There is no shifting of the burden of proof. It remains upon the State throughout the trial. The evidence may shift from one side to the other. The State may establish such facts as must result in a conviction, unless the presumption they raise be met by evidence; but still the burden of proof is on the State to establish the guilt of the accused beyond a reasonable doubt.' "

It is to be observed there is no reference to Virginia authority for the above conclusion, except the instruction in *Litton's Case* containing the trial court's addendum already quoted. The reasons assigned for the reversal of the judgment, in my opinion, are correct. They apply with equal force to the second instruction, which the court approved. Whatever is incomprehensible in *Potts' Case,* is due to the fact that the court did not seem to realize it was endeavoring to reconcile doctrines that are irreconcilable—two propositions which so flatly contradict each other as to have led to the majority and dissenting opinions in the leading case of *Commonwealth* v. *York.*

If the humane principles underlying the action of the court in reversing the judgment in *Potts* v. *Commonwealth* are to be applied in Virginia, the older doctrine is overruled and instructions based upon the ancient dogmas should no longer be given. The case seems to have escaped, to a surprising degree, the attention of the courts as well as of members of the profession.

The allegation of an indictment that the killing was done "of his malice aforethought" is an allegation of *fact,* not of law. Without that allegation of fact the indictment would not charge

murder. The law can not presume a fact. A fact can be established only by evidence. If it is a principle of civilized law that the State should prove the guilt of the individual before it can subject him to punishment, the burden rests upon the State to prove every fact necessary to establish the guilt of the accused, including the fact of his mental attitude when the question either of guilt or of the degree of guilt depends upon his mental attitude. The prosecution may produce evidence so strong as, in the absence of explanation to warrant the conclusion of guilt as an inference of fact. The failure to offer an explanation is of itself a circumstance tending to sustain the adverse inference of fact. Such conclusions are the results of evidence and accord with the common knowledge and experience of mankind. The proposition that the law, without evidence as to motive or intent, presumes *in limine* that the crime is murder cannot be sustained on any philosophic theory.

Chief Justice Shaw was undoubtedly a lawyer of wonderful learning and ability, but he did not always clarify the subject. His opinion in *Commonwealth* v. *Rogers,* 7 Metc. 500, has been a puzzle to the profession. In that case, however, he was dealing with the defense of insanity. I think he presided in the trial of *Commonwealth* v. *York.* He wrote the majority opinion of the court. This is the philosophic theory quoted from Greenleaf, which he states as the basis of the presumption of malice:

> "The general doctrines of presumptive evidence are not peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in any animal with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle of its application."

A doctrine which needs the support of a false analogy cannot be sound. It may be conceded as a fact of nature that all web-footed animals are aquatic, without giving support to a presumption of law that all persons who take human life by the deliberate use of a deadly weapon are murderers. The syllogism contains a false premise. That logic would convict of murder the innocent person who purposely killed, with a deadly weapon, a robber, a burglar, or any other murderous assailant, in order to defend his

own life. Well-nigh all forms of justifiable killings are accomplished by the deliberate use of a deadly weapon. Most forms of excusable homicide are committed in the same way. A person may lawfully arm himself with a deadly weapon and deliberately use it in self-defense.

Again, the proposition I am combatting is not confined to homicides committed by "the deliberate use of a deadly weapon." It is, that "every homicide, (however committed) is presumed in law to be common-law murder."

In another aspect the quotation from Greenleaf was unfortunate. Greenleaf was speaking of presumptive *"evidence."* Yet the language quoted, although involving a patent fallacy, was used to support the proposition that the law, without any evidence, showing either the motive for the act or the character of the weapon used, arbitrarily presumes the killing to be murder at common law.

I said awhile ago that this presumption could not have originated in an enlightened age. Our decisions warrant that statement. After the statute was passed in this State dividing common-law murder into two degrees, our court was called upon to say whether the law presumed the killing to be murder of the first degree. It held there was no such presumption and that the Commonwealth must prove beyond reasonable doubt the existence of the mental attitude necessary to constitute a "wilful, deliberate and premeditated killing."

The English statute, 23 Henry VIII, c. 1, sec. 3, divided the crime that had previously been known as murder so as to impose the death penalty for all murder "committed with malice prepensed." Ancient English trial judges thereupon used expressions which have been formulated into the arbitrary doctrine that "the law presumes malice from the fact of killing," that is, that the law presumes every killing to be of the kind made punishable with death by the English statute.

Our statute classes as murder of the first degree every murder committed by any "wilful, deliberate and premeditated killing." Why should "malice"—a mere state of mind—be presumed by law under the English statute, and a "wilful deliberate and premeditated" intent to kill—another mere state of mind—not be presumed under the statute of this State? There is no difference in principle. The difference in the judicial rulings is attributable

to the ages and the periods of human progress at which the two questions were presented. It would be unfortunate for our law to be longer disfigured, or be made the possible instrument of injustice, by mere adherence to a judicial error of the past.

The Supreme Court of the United States, in *Brown* v. *United States,* a case decided on May 16, 1921, refers to "the developments of the law from the time when a man who had killed another, no matter how innocently, had to get his pardon, whether of grace or of course;" and adds: "Concrete cases or illustrations stated in the early law in conditions very different from the present * * * have had a tendency to ossify into specific rules without much regard for reason."

I shall not impose upon your patience by citations from cases decided in other states which have adopted the views I am now presenting. It is sufficient to say these views are being very generally adopted.

Like every student of Virginia law, I commenced my career fully impressed with the soundness of the presumption. Without giving it serious consideration, I accepted it as it had been laid down in the Virginia decisions. When I read *Commonwealth* v. *York* the first time, I was convinced by the majority opinion and was surprised that any judge should have dissented. I did not read the dissenting opinion. When I read the case again I wondered why the doctrine needed the support of the analogy of the "web-footed animal." To my mind that was "the little rift within the lute." Further investigation showed me that the argument of the defendant's counsel and the dissenting opinion in *Commonwealth* v. *York* were being accepted in many of the states, and, as I believe from the consideration I have been able to give the subject, should be accepted as the law in all the states.

What I have said thus far has been on the side of the defendant charged with the crime of murder. On behalf of the Commonwealth, I wish to suggest that our law would be much simplified and improved if the definition of murder should be recast and the word "malice" should be omitted.

It has long been held that for a killing to amount to common-law murder, it need not be "wilful;" and that the malice, constituting the distinguishing characteristic of murder, need not be "aforethought," and need not exist as an actual fact or actual

state of mind, but only as an imputation of law. Judicial thought is approaching the conclusion that the term "malice aforethought," certainly in the sense of an actual state of mind to be described in words, no longer serves any useful purpose in the definition of murder, while its retention tends only to confusion in the minds of juries, whose functions, under our system of trials, are so important in the administration of justice.

Homicides are either lawful or unlawful. The lawful kinds are (1) justifiable and (2) excusable. The unlawful kinds are (1) manslaughter and (2) murder. Manslaughter is either (a) involuntary or (b) voluntary. Murder is either (a) murder of the second degree or (b) murder of the first degree.

There is nothing artificial about the lawful grades or the two kinds of manslaughter. Until we reach the degrees of murder there is nothing difficult or mysterious in the law. When we come to murder we find that the conflict and confusion with which the subject is beclouded are attributable to those two words, "malice prepensed", used in the statute 23 Henry VIII, c. 1, sec. 3.

To determine whether an act of homicide is or is not murder, we first ascertain whether the killing is lawful or unlawful. If it is unlawful, we ascertain whether it is manslaughter or murder. If there are no circumstances extenuating it, so as to make it either voluntary or involuntary manslaughter, it must be murder of one or the other degree. If it is a wilful, deliberate, and premeditated killing, without justification or excuse; or if it is committed by poison, lying in wait, starving or imprisonment, or in the commission of, or attempt to commit, any of the collateral felonies mentioned in the statute, it is murder of the first degree. If it is committed by the infliction of bodily harm, without justification, excuse or alleviation, but without a wilful deliberate and premeditated intent to kill; or if it is committed in the commission of, or attempt to commit, any collateral felony other than those enumerated in the statute, or by the doing of any wrongful act so obviously dangerous to human life as to amount to more than involuntary manslaughter, it is murder of the second degree. To say, when facts have been adduced thus showing that murder of either degree has been committed, it must also have been done with "malice," is to add misleading surplusage.

There is nothing peculiar in either grade of homicide. Whether

the accused has committed one kind or another is purely a question of fact. In justice to the person accused, there should be no artificial presumption against him. In justice to the Commonwealth the word "malice" should be stricken from the law, for it only mystifies courts and juries.

Gentlemen of the Association, I am aware that the views I have expressed are opposed to doctrines which have for a long time been considered established. Whatever might be my personal opinion, if I had nothing else to offer, I should not have stated it on this occasion. If my opinion were opposed to an unbroken line of legal authority I should not have given it utterance. I should have had the feeling expressed by Lord Erskine, in his great speech in defense of Hadfield: "But the wisdom of the law is greater than any man's wisdom. How much more, therefore, than mine."

The opinion I have expressed is derived from the eminent writers and judges to whom I have referred. If what I have said shall lead the learned judges and lawyers of this State to give their consideration to the views I have presented, I shall feel justified in having had the temerity to accept the invitation extended to me by the Executive Committee, which has afforded me the distinguished privilege of addressing this Association.